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Where, as in the principal case, two rights are being exercised which it is the policy of the law to protect, the justification would seem sufficient.

Although the competitor's self-interest is in fact advanced and there is an exercise of the *jus disponendi*, a further question is raised where the defendant acts solely from malicious motives.[14] Here again the question is one of policy, whether an entire protection of these interests is so essential to the public as to make considerations of motive relatively unimportant. Privileged communications in court and the right to collect a debt are of this class.[15] On the other hand some recent cases make actionable the use of property for such purposes as spite fences or maliciously draining a neighbor's spring.[16] The policy of such a limitation on the anti-social exercise of property rights would seem to apply with greater force to competition and price cutting from bad motive only, since the complex interdependence of modern business relations causes individual acts to have far-reaching effects. If these cases may fairly be regarded as characteristic of a tendency in the common law, an extension of the same reasoning to price cutting actuated only by bad motive may be suggested as a possible development consistent with public policy.[17]

RIGHTS OF PASSENGER ASSISTING IN RESTRAINT OF DISORDERLY FELLOW-PASSENGER. — It is clearly established that a carrier is held to the utmost care consistent with efficient service to protect a passenger from assaults by other passengers.[1] So great is this duty that if the conductor unaided is unable to control the situation, he must call in the rest of the crew and at least such passengers as are willing to help quell the disturbance.[2] While this can scarcely be said to be using utmost care to the well-disposed passenger summoned, the courts in the past seem never to have been called upon to determine his rights if assaulted by the disorderly fellow-passenger. However, the Supreme Court of Mississippi recently had this question squarely presented. *Spinks* v. *New Orleans, M. & C. R. Co.*, 63 So. 190. In this case the plaintiff, a passenger, was requested by the conductor to help restrain an intoxicated passenger who had been wandering through the coaches and resisting efforts to keep him from jumping from the train. The court, in holding that the railroad was not liable for an assault committed by the unruly passenger, went on the short ground that the conductor had not failed in his duty of care. This seems unjustifiable. The evidence taken most favorably for the plaintiff, since a directed verdict for the defendant was affirmed, showed that the conductor, knowing of the irresponsible condition of the

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[14] For discussion of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501; 26 HARV. L. REV. 740.

[15] Morris *v.* Tuthill, 72 N. Y. 575; South Royalton Bank *v.* Suffolk Bank, 27 Vt. 505; Scott *v.* Stansfield, L. R. 3 Ex. 220. See also Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618.

[16] For collection of authorities see 18 HARV. L. REV. 415, footnotes; 8 MICH. L. REV. 472, footnotes; 62 L. R. A. 673, note.

[17] See discussion in POUND, THE END OF LAW, 27 HARV. L. REV. 195, 226 ff.

[1] Pittsburg & C. R. Co. *v.* Pillow, 76 Pa. St. 510; New Orleans, St. L. & C. R. Co. *v.* Burke, 53 Miss. 200.

[2] See Pittsburg, F. W. & C. Ry. Co. *v.* Hinds, 53 Pa. St. 512, 517.

assaulter, did not first summon the rest of the crew, but ordered the plaintiff to assist and himself left the scene of trouble. It seems clear that this was not even ordinary care under the circumstances. While the conductor's conduct would be a breach of duty to a passenger, the question is presented whether the railroad may have an affirmative defense that the plaintiff in volunteering forfeited his rights as a passenger.

To be sure an outsider who volunteers at the request of one of the employer's servants becomes a servant, and is denied recovery if injured by a fellow servant's negligence.[3] If the volunteer, however, is not solely a Good Samaritan, but does the work partly at least for purposes other than the railroad's, he is not wholly the servant of the company, but is acting for himself and so entitled to his independent rights.[4] In a case like the present, the passenger in putting down a disturbance may be said in a way to be expediting his own journey. But more clearly than this his purpose was to secure peace not for the sake of the railroad, but in concert with it for the benefit of the public. As the plaintiff was not a trespasser and did not become a servant, there seems to be no reason why the plaintiff was not still a passenger.

But if it is conceded that the plaintiff retained his status as a passenger, it may be urged that by approaching a riotous fellow-passenger he assumed the risk.[5] But when a passenger acts upon orders of a trainman, he is allowed to assume risks that otherwise would bar recovery,[6] and especially in a situation like the present where one sacrifices himself for a higher duty, even a stronger reason appears for not applying the ordinary doctrine of assumption of risk.[7]

If it is granted then that the passenger continues in his full rights as such, recovery is assured unless the railroad has some extraordinary justification for thus summoning him into danger and was not further negligent. One may be compelled to assist a police officer,[8] and in certain cases at sea be compelled to assist the captain.[9] If the view is taken that the peculiar position of the railroad as a public service corporation confers upon its conductor like police power in emergencies, and that the passenger is under duty to obey, the higher duty to the state may well be said to supersede the railroad's duty to the passenger. The passenger could not then ask for recompense for being called to do his duty.[10] Even

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[3] Degg *v.* Midland Ry. Co., 1 H. & N. 773; Wischam *v.* Rickards, 136 Pa. St. 109, 20 Atl. 532.

[4] Shipper assisting in loading train: Eason *v.* S. & E. T. R. Co., 65 Tex. 577; Welch *v.* Maine Central R. Co., 86 Me. 552, 30 Atl. 116; Louisville & N. R. Co. *v.* Ward, 98 Tenn. 123, 38 S. W. 727. Drover shunting cattle cars: Wright *v.* London & N. W. Ry. Co., L. R. 1 Q. B. D. 252. Passenger pushing car back on track: McIntire Ry. Co. *v.* Bolton, 43 Ohio St. 224, 1 N. E. 333.

[5] See Illinois Central R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101.

[6] Galloway *v.* Chicago, R. I. & P. Ry. Co., 87 Ia. 458, 54 N. W. 447; Irish *v.* Northern Pacific Ry. Co., 4 Wash. 48, 29 Pac. 845. This is sometimes limited to when the passenger is reasonable in so acting. Hunter *v.* Cooperstown & S. V. R. Co., 112 N. Y. 371. But there is some authority allowing great risk at the conductor's order. See Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S. 291; 4 ELLIOTT, RAILROADS, § 1643.

[7] *Cf.* Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 28 N. E. 172, where the plaintiff was injured while rescuing a child from an approaching locomotive.

[8] Regina *v.* Sherlock, 10 Cox C. C. 170; McMahon *v.* Green, 34 Vt. 69.

[9] See Boyce *v.* Bayliffe, 1 Camp. 57; ABBOTT, SHIPPING, 14 ed., 901.

[10] A somewhat analogous situation occurs in admiralty, where if a passenger saves

on this theory the Mississippi case seems erroneous; for while the railroad would be justified in calling in the plaintiff, the conductor subsequently was negligent in leaving and not summoning the rest of the crew to aid and protect him.

A second view may be taken that a conductor, not being as a rule so far from help or subject to such great perils, is not like a sea-captain, and that a passenger by entering a train does not come under a duty to assist him.[11] It must then follow that the railroad, having no justification, is liable for injuries resulting from inviting a passenger into danger, regardless of its subsequent diligence. Doubtless the railroad is placed in the difficult position of liability to the other passengers if passengers are not called to aid; while if they are summoned, the railroad is liable to the volunteers if they are injured. If this result seems overburdensome upon the carrier, an escape is presented by adopting the first view that a passenger is under duty to assist the conductor.

REQUISITES AND PROOF OF COMMON-LAW MARRIAGES. — From early times it has not always been clear what acts were necessary to the validity of a marriage.[1] According to early civil law the consent of the parties was sufficient,[2] but it seems doubtful whether under the early English common law[3] a marriage without a minister was valid.[4] In this country, however, many states have adopted the view that a marriage may be valid even without a ceremony before third parties.[5] The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so-called common-law marriage.[6] But both on principle and authority it would seem that the agreement alone is sufficient to consummate a common-law marriage and that the subsequent cohabitation is important only as evidence of the agreement.[7]

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the ship by acts he was obliged to do in emergency, he is awarded no salvage. The Vrede, 1 Lush. Adm. 322. But if he acts beyond his duty he may recover. Newman *v.* Walters, 3 B. & P. 612; The Great Eastern, 24 Fed. Cas. No. 14,110; 2 PARSONS, SHIPPING AND ADMIRALTY, 268.

[11] The courts in Pittsburg, F. W. & C. Ry. Co. *v.* Hinds, cited in note 2, *supra*, and in the Mississippi case, seem to have considered that there was no duty to help the conductor.

[1] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 811 *et seq.*

[2] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 812.

[3] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 817–818; RODGERS, DOMESTIC RELATIONS, § 85.

[4] By statute in England a ceremony is now required. 26 Geo. II, c. 33. But it can be before a civil officer. 6 & 7 William IV, c. 85. In Scotland an agreement to be married henceforth is sufficient. Dalrymple *v.* Dalrymple, 2 Hag. Cons. 54.

[5] Shorten *v.* Judd, 60 Kan. 73, 55 Pac. 286; Hutchinson *v.* Hutchinson, 196 Ill. 432, 63 N. E. 1023; Chamberlain *v.* Chamberlain, 68 N. J. Eq. 414, 59 Atl. 813; Tartt *v.* Negus, 127 Ala. 301, 28 So. 713; *In re* Hulett's Estate, 66 Minn. 327, 69 N. W. 31. *Contra*, Dunbarton *v.* Franklin, 19 N. H. 257. Some states by statute have declared common-law marriages invalid. Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829; see Com. *v.* Munson, 127 Mass. 459–460. Other states have declared marriage a contract, and in such states a contract is usually sufficient. State *v.* Bittick, 103 Mo. 183, 15 S. W. 325. It is generally held that statutes setting forth the ceremony for marriages are only directory, and even in these states common-law marriages are good. Renfrow *v.* Renfrow, 60 Kan. 277, 56 Pac. 534.

[6] See Shorten *v.* Judd, 60 Kan. 73–77, 55 Pac. 286–287.

[7] Thoren *v.* Attorney-General, 1 A. C. 686; Mathewson *v.* Phoenix Iron Foundry,